Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Recommendations of the Independent Panel	)	
Reviewing the Impact of Hurricane Katrina	)	EB Docket No. 06-119
On Communications Networks	)	
	)	

COMMENTS
OF
THE CHAMPAIGN URBANA WIRELESS NETWORK, THE TEXAS ISP ASSOCIATION, THE ASSOCIATION FOR COMMUNITY NETWORKING, AND ACORN ACTIVE MEDIA

The Champaign Urbana Wireless Network (CUWN), the Texas ISP Association (TISPA), the Association for Community Networking (AFCN), and Acorn Active Media (Acorn) (collectively "CUWN, *et al.*") applaud the Commission for its efforts to improve the performance of our national communications infrastructure in the face of natural and man-made disaster.

Members of the organizations represented here participated in the response to Katrina and Rita as part of a number of local and national volunteer responses. *See, e.g.,* Transcript of FCC Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, March 6 & 7, 2006, testimony of Jeff Allen, Core Coordinator, Community Wireless Emergency Response Initiative at 212-13 (describing multiple efforts and *ad hoc* coordination).[1] CUWN, *et al.* support several of the recommendations of the Independent Panel with regard to dispersing communications equipment, outreach to community institutions, greater coordination among responders and among federal, state and local governments, and expanding the scope

[1]Available at http://www.fcc.gov/eb/hkip/transc2.pdf

of responders eligible for training and credentialing in advance to facilitate a speedy response. Indeed, these recommendations echo specific recommendations made by community wireless and WISP volunteers. *See, e.g.,* Jeff Allen, "Radio Response's Activities Following Hurricane Katrina," March 6, 2006.[2] Based on the experience of Radio Response volunteers, CUWN, *et al.* provide specific suggestions below to help guide the Commission in implementing these recommendations.

In addition, CUWN, *et al.* raise a point of concern. In 2005, the Commission determined that providers of broadband internet access services, with regard to the telecommunications component of such access,[3] must comply with the requirements of the Communications Assistance to Law Enforcement Act (CALEA) by May 14, 2007. *In re Communications Assistance to Law Enforcement Act*, *2nd Report & Order*, 21 FCCRcd 5008 (2006) (*CALEA II*); *In re Communications Assistance to Law Enforcement Act*, *First Report & Order and Further Notice of Proposed Rulemaking*, 20 FCCRcd 14989 (2005) ("*CALEA I*").

As explained below, application of CALEA to volunteers creating temporary *ad hoc* networks in response to disaster situations is unclear. Because the fear of liability may prevent volunteers from constructing such networks, or may dissuade people from using such networks, the Commission should clarify that CALEA does not apply to

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[2]A copy of this report was submitted into the record created by the Independent Panel.

[3]As distinguished from the information service component, which the Commission regards as separable in this context. *See American Council on Education v. FCC*, 451 F.3d 226, 234 (DC Cir. 2006), *petition for rehearing pending*.

temporary *ad hoc* networks. Alternatively, the Commission should issue a blanket waiver for those who construct, operate and use such networks. At the least, the Commission should clarify that those who construct such networks and then turn over maintenance and operation to others will not be held liable if the networks remain in operation for any significant time.

INTEREST OF PARTIES

The Champaign Urbana Wireless Network (CUWN) operates and administers a municipal wireless network for the City of Champaign, IL using open source mesh technology that it has developed and released to the public. Thousand of people from around the world have downloaded this software to implement commercial and noncommercial mesh networks in environments from the largest American cities to isolated villages in developing nations. CUWN is a recognized leader in the open source community for the development of wireless mesh solutions and provides advice to community wireless networks both in the United States and abroad.

The Texas ISP Association (TISPA) is a trade association of Texas ISPs committed to advocate and support a healthy internet industry in Texas. TISPA's membership includes small, medium and large ISPs operating in the State of Texas.

The Association for Community Networking (AFCN) provides resources, shared learning, and experienced guidance to help communities and organizations use information and communications technologies effectively. AFCN has over 150 individual and organizational members.

Acorn Active Media is a consulting firm that engages in software, website and technical development in service of the global justice movement.

ARGUMENT

I. IMPLEMENTATION OF PANEL RECOMMENDATIONS

CUWN, *et al.* support several of the recommendations of the Independent Panel. Specifically, CUWN, *et al.* agree that advance planing and greater coordination between responders, local institutions, and various levels of government would

significantly enhance the ability of volunteers to respond in a crisis.

Commentors here recommend that the FCC can best serve as a clearing house of best practices and as a credentialing organization. The newly-formed Office of Homeland Security should act to empower local, regional and national organizations to take the necessary steps to organize local and regional responses. At the same time, however, the FCC must be wary of becoming a bottleneck to local initiatives.

Commentors therefore recommend that the FCC develop, through further consultative processes, a set of standards for credentialing volunteer communication first responders. Several models already exist on a state and federal level for disaster preparedness.

In this model, the FCC would list organizations authorized to provide an FCC credential as a "communications first responder" based on a determination by the Office of Homeland Security that the organization in question meets minimum standards established by the OHS. OHS would maintain a database of credentialed volunteers that it would share with federal, state and local agencies. Credentialed volunteers could direct local officials and contacts on the ground to the FCC's database to establish their bona fides. OHS would also work with relevant federal and state agencies, as well as other responder organizations, to determine when credentialed communications first responders could or could not enter an area.

OHS would also provide a means by which communications first responders could record their progress, share experiences in real time, and avoid accidental conflicts. As reported by Radio Response, officials and contractors did, on occasion,

impede access to equipment or tower emplacements because they did not recognize the Radio Response volunteers and equipment as performing needed services. Even when volunteers had Red Cross or FEMA credentials, some individuals needlessly impeded the work of Radio Response volunteers or destroyed already established networks because they were not "official." *See, e.g., Radio Response Report* at 13-14.

An ability to log projects and project status with OHS could provide verification that the networks deployed by communication first responders are valuable responses to an emergency situation and should not be casually displaced or disabled.

Similarly, OHS can play an important role in acting as a clearing house for best practices with regard to outreach, education, and caching of equipment. In this capacity, OHS would review submissions from local organizations. Where these submissions provide true factual information, OHS should archive them. OHS should also take advantage of tools that allow users to comment on materials and offer suggested changes. In this way, materials and strategies are constantly updated, improved, and adapted to individual circumstances.

Finally, OHS should consider maintaining tools for interactive real time communication between responders and communities in need. In times of crisis, OHS could use this network to notify responders of important news and information. Also, to the extent possible, FCC personnel could respond to questions and address misconceptions about FCC rules and regulations on a real time basis.

II. THE FCC SHOULD CLARIFY THAT CALEA DOES NOT APPLY TO TEMPORARY *AD HOC* NETWORKS.

In response to Katrina and Rita, Radio Response volunteers used donated equipment to create *ad hoc* networks to provided needed connectivity for rescue personnel and evacuees. As described by Jeff Allen, these networks acted as a valuable "force multiplier" for other relief organizations and public safety officials. *Testimony of Jeff Allen* Tr. at 215. Volunteers would enter a region, build a network, turn it over to local control, and move on. During the course of a project life, volunteers would turn over frequently as individuals returned home or moved on to other projects. Often times there was no one individual clearly responsible for deployment, maintenance or upkeep of the network.

Nor were networks removed within a well-defined period of time. Many were up for weeks. Some networks, according to Jeff Allen, may continue to remain in operation. The volunteers that constructed these networks have no way of knowing the status of the networks after they move on to new projects or return home.

The Commission should clarify that volunteers building *ad hoc* networks in response to an emergency situation need not comply with CALEA. By its terms, CALEA applies only to "telecommunications carriers." 47 USC §1002. No individual involved in the creation or maintenance of *ad hoc* networks described by Radio Response can rationally be considered a "telecommunication carrier."

As defined by CALEA, a "telecommunication carrier" is "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier ***for hire***." 47 USC §1001(8)(A) (emphasis added). Volunteers providing temporary *ad hoc* networks certainly do not fall under this definition. If

nothing else, the fact that they do not provide such services "for hire" excludes networks of the kind created and temporarily operated and maintained by Radio Response volunteers.

Nor, however, do volunteers constructing *ad hoc* networks fall under the "substantial replacement provision" (SRP) of 47 USC §1001(8)(B)(ii). As explained, no single person or entity creates or has overall responsibility for creating and maintaining the network. At best, the provision of donated wireless transmitters operating on Part 15 unlicensed spectrum would constitute provision of equipment or equipment services, a category of activity exempt under 47 USC §1002(b)(2)(B).

In addition, volunteers such as Radio Response do not act as a "substantial replacement" for the public switched telephone service. By their nature, these networks are designed to be temporary and of limited (if indeterminate) duration. As such, they are not a "replacement" for the public switch telephone network under the logic advanced by the Commission in *CALEA I*. There, the Commission found that broadband access providers constitute a "substantial replacement" for the traditional public switched network "if a service replaces any significant part of an individual subscriber's functionality previously provided via circuit-switched local telephone exchange service." *CALEA I* at 14994. A temporary network designed to provide limited emergency functionality does not "replace" the traditional public switched network anymore than a Family Service Radio "replaces" a wireless telephone during a black out. It is a temporary patch until connectivity is restored. Accordingly, the FCC should clarify that temporary *ad hoc* networks created in response to emergencies do

not fall under the SRP.

Finally, the SRP requires that the Commission determine that classification of a network as a "substantial replacement" serves the public interest. 47 USC §1001(8)(B)(ii). The Commission determined that classification of broadband access providers generally as SRPs served the public interest because such classification furthered the government's important interest in law enforcement while imposing little comparative cost to competition or innovation. *CALEA I* at 15004-15005. The Commission also subsequently found that network operators could mitigate the burden of compliance by relying on trusted third parties. *CALEA II*, 21 FCCRcd at 5370-72.

These considerations do not apply in the context of volunteers rushing to assemble temporary *ad hoc* networks in response to some natural disaster or terrorist attack. The Commission must carefully consider whether the fear of liability for failing to comply with CALEA will deter volunteers from creating these much needed networks, or will dissuade people and organizations from using or maintaining such networks. Even a modest chilling effect could have significant consequences for public health and safety, a circumstance not considered by the Commission in its determination to apply CALEA to broadband access providers generally.

While application of CALEA in this context creates the strong possibility of harming public health and safety by discouraging deployment of needed infrastructure, it would do little to further the advancement of law enforcement. It is difficult to imagine criminals or terrorists sneaking into the aftermath of a disaster such as Katrina for the sole purpose of locating a Red Cross shelter with a temporary network.

On the other hand, as explained in the record, law enforcement and public safety officials relied on these *ad hoc* networks and used them as a supplement to existing networks. Application of the SRP to *ad hoc* networks would therefore both fail to advance the law enforcement interest identified in *CALEA I*, while the chilling effect of applying the SRP would impede the ability of law enforcement to take advantage of these networks during times of crisis.

Finally, creators of *ad hoc* networks cannot use trusted third parties to mitigate costs, as suggested by the Commission in *CALEA II*. As a matter of simple equity, it is inappropriate to subject volunteers using donated equipment to the cost and possible liability of CALEA compliance. To the extent the Commission relies upon the ability to used trusted third parties as an element in its public interest calculus, it does not apply in this situation.

If the Commission nevertheless determines that temporary *ad hoc* networks created in response to emergency situations are subject to the general determination the Commission made in *CALEA I*, the Commission should provide a general waiver pursuant to its authority to exempt any "class or category of telecommunications carrier." 47 USC §1001(8)(C)(ii).[4] For the reasons detailed above, it would serve the

[4]This section requires the Commission to "consult" with the Attorney General before granting such a waiver. Based on the Supreme Court's recent analysis of similar statutory language in the context of the Attorney General's power over determinations made by the Secretary of Health and Human Services (with regard to listing or de-listing physicians for eligibility to prescribe controlled substances), it is clear that the Commission is required only to seek the view of the Attorney General and to give proper considerations to any concerns raised. Ultimate authority on whether to grant such a waiver, however, remains with the Commission. *See Gonzales v. Oregon*, 126 S. Ct. 904, 919-920 (2006) (contrasting limited authority of Attorney General to determine public interest outcome with broad authority vested in FCC. "When Congress chooses to delegate a power of this extent, it

public interest to exempt those who create and maintain temporary *ad hoc* networks.

At the very least, if the Commission declines to clarify the general application of CALEA to temporary *ad hoc* networks or to grant a waiver to temporary *ad hoc* networks as a class, it should clarify that individual volunteers and equipment donors will not be held liable. Rather, if the Commission must impose liability, it should impose liability on those operating the network who can, if they wish, avoid liability by shutting the network down. To subject individuals and donors to potential liability because of their possible involvement in a network that ultimately is found not to comply with CALEA would certainly discourage donors and volunteers, creating significant danger to public health and safety.

CONCLUSION

The Commission has responded to the Katrina and Rita disasters in an exemplary fashion. It does not exaggerate to characterize the FCC as the "superstar" of the Federal government during the crisis. That the Commission has continued to search for ways to improve our national communications infrastructure before the next catastrophic event further underscores the Commission's leadership and responsiveness to the public interest.

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does so not by referring back to the administrator's functions but by giving authority over the provisions of the statute he is to interpret." (Citing *NCTA v. Brand X Internet Services,* 125 S.Ct. 2688 (2005))).

The recommendations provided by CUWN, *et al.* serve as a starting point for unleashing the potential for volunteers around the country to leverage new technologies to improve responsiveness in times of crisis. If the Commission takes steps to enable volunteers and communities to develop decentralized responses and best practices, while removing the fear that volunteering will leave one open to liability for failure to respond to CALEA, the Commission will facilitate the creation of a "force multiplier" for emergency response on an unprecedented level.

Respectfully submitted,

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